Filed 1/28/10 In re Donald S. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re DONALD S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. DONALD S., Defendant and Appellant.	A124307 (Solano County Super. Ct. No. J39191)

I.

Appellant Donald S. (Donald) appeals from the trial court's finding that he is a person described by Welfare and Institutions Code section 602, subdivision (a), in that he did commit the offense alleged in a juvenile petition; to wit, second degree robbery.[1] His sole contention on appeal is that the true finding is not supported by substantial evidence. We disagree and affirm.

[1] Donald filed his notice of appeal challenging the trial court's jurisdictional finding that he committed second degree robbery. However, that finding was not then appealable because no dispositional order had issued. By order of this court dated April 27, 2009, and in the interests of justice, we construed the notice of appeal as having been taken from the trial court's subsequent April 21, 2009 dispositional order.

II.

A. Procedural History

A petition under Welfare and Institutions Code section 602, subdivision (a), was filed by the Solano County District Attorney's Office on February 11, 2009,[2] alleging that Donald committed felony second degree robbery on T.,[3] also a minor, on February 10. (§ 211.) The petition also alleged a second misdemeanor count of battery upon T. on school property. (Pen. Code, § 243.2, subd. (a).)

A jurisdictional hearing was held on March 9 and 10, at which time the court heard testimony as to the petition relating to Donald, as well as one charging another minor, J.D., with the same crimes. At the conclusion of the hearing, the trial court found that Donald had committed the lesser included offense of attempted second degree robbery. (Pen. Code, § 664/211.) The petition as to J.D. was dismissed. The court found that the misdemeanor allegation was not sustained.

A dispositional hearing was held on April 21, at which time Donald was adjudged a ward of the court, placed in the custody of his mother, and granted probation, with conditions imposed as stated on the record.[4] This appeal followed.

B. Evidence Adduced at the Jurisdictional Hearing

The first witness to testify at the jurisdictional hearing was 12-year-old D.N. On February 10, he was nearby Franklin Middle School with his friend T. The two were walking over to the PAL (Police Activities League) courtyard. As they walked, "five guys came up" to them. One of them was Donald. Donald ran in front of T. and told him to "[e]mpty out [his] pockets." D.N. told Donald he did not have anything, to which Donald responded, "I don't believe you. Empty your pockets." D.N. took this statement to mean "[g]ive me all your money." The words were stated in a normal tone of voice

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[2] All further dates are in the calendar year 2009, unless otherwise indicated.

[3] The victim, T., is not to be confused with T.T., another minor who was present during the February 10 incident.

[4] No aspect of the disposition is challenged on appeal.

"like they were talking to someone they knew." At this point T. ran, and several of the boys ran after him. One punched him in the head, and the others hit him as well.

On cross-examination, D.N. added that T. wore glasses. They fell off during the altercation, and could not be found afterward. D.N. testified that when T. started to run, he only got about a foot away before the punches started.

D.N. had been asked for money at school before, but the people asking were people he knew from school, and it would be said as a joke. On February 10, "[t]hese guys" were not joking because they looked serious for a minute before they started looking normal again.

Twelve-year-old T. testified next. He stated that he was walking around the field at Franklin Middle School on February 10 with D.N. when five "kids were trying to steal our stuff" by stopping them and telling them to empty their pockets. One of the five was Donald. He stood directly in front of T., told him to empty his pockets and then punched T. in the face. Donald then began beating on T. as his friends joined in. During the melee T.'s glasses "disappeared," and T. was unable to find them later. As a result of the confrontation, T. received a bump to the back of his head, a cut on the side of his ear, and a "little hole" on top of his nose.

After he was punched, T. got mad at the boys who hit him. He fought back by throwing one punch. The other boys joined in and started punching him from behind. While this was going on D.N. was being "guard[ed]" by the other boys.

T. admitted he was scared about testifying but that he was more scared during the fight. After Donald told him to empty his pockets, he was scared during the 30 seconds or so before Donald punched him. He could not simply say "no" and walk away because the five boys surrounded him. Donald was a couple of feet away from him, and the others were 10-15 feet away.

Next to testify was J.D., one of the minors charged in the petition. He denied ever hitting either T. or D.N., but he saw them being hit. J.D. was at the field that day "hanging" with his friends, including Donald and T.T. There were five boys in all. J.D. saw "some pushing going on," and then T. hit Donald. Donald then took off his jacket

and the two "then went at it." In contradiction, J.D. also testified that he did not participate in the fight, as he came upon the scene "after the fight had been done." He didn't see the fighting; he just "walked over after it was over."

Fifteen-year-old A.V. stated he saw the whole thing from about 32 feet away. A.V. and his friends were "hanging around" in the back of the school when Donald said he wanted to buy some chips, and that he was going to get a dollar from somebody. Donald walked over to "the kid." A.V. could not hear what was said, but he saw Donald hold out his hand "like for a handshake," and "the kid" hit Donald. Donald then pushed back. Donald then ran while the boy started running after Donald until T.T. hit him in the head, knocking him to the ground.

Donald testified as the last witness at the jurisdictional hearing. On February 10 he was "hanging out" after school. He did not tell his friends why he was going up to T., but he did approach him. Donald walked up to T. and asked him for a dollar. T. refused. Donald asked him if he had any money and T. said "no." Donald did not know T.

Donald stated that he had asked other people at school for money, including strangers. Likewise, other students had asked him for money. Sometimes the money was paid back. He had seen other students also ask for money.

When T. said he did not have any money, Donald waved his hand. According to Donald, T. must have thought Donald was going to hit him, so T. pushed Donald. Donald then pushed T. back. T. then rushed Donald and punched him in the right ear area. Donald then removed his backpack and jacket, and ran towards T. Donald's friends, including T.T., were behind Donald when he approached T.

After T. and Donald finished, T. came up to T.T. and called him a name. T.T. got mad and hit him.

After testimony was completed, counsel made arguments to the court. The prosecutor conceded that the evidence did not support a finding that a completed robbery had occurred, but there was sufficient evidence of an attempted robbery. Defense counsel argued the evidence did not support any charge or lesser included offense.

The juvenile court judge agreed there was no completed robbery proved because there was no evidence that anything was actually taken from T. However, the court found the evidence sufficient to sustain a finding of attempted robbery. The court decided not to sustain the misdemeanor count because it was "part and parcel" of the attempted robbery.

III.

A. Standard of Review

Donald claims on appeal that there was insufficient evidence presented at the jurisdictional hearing to support the juvenile court's true finding that he committed an attempted robbery. A juvenile's challenge to the sufficiency of the evidence in support of a jurisdictional finding is subject to the same standard of review that applies to sufficiency of the evidence challenges in adult criminal cases—the substantial evidence rule. (*In re Roderick P*. (1972) 7 Cal.3d 801, 809.) Under that rule, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We resolve "neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, [the] testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

B. Discussion

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) An attempted robbery consists of two elements: (1) the specific intent to commit the robbery, and (2) a direct, unequivocal, overt act (beyond mere preparation) toward its commission. (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.) Although it is not entirely clear from his briefs, it appears that

Donald is challenging the findings as to both elements of attempted robbery. In reviewing the evidence, we recognize that several versions of the February 10 incident were recounted at the jurisdictional hearing. However, consistent with our role as a reviewing court, we consider the evidence in a light most favorable to the lower court's decision.

As to the first element, "an attempt to steal may be proved by inference from all of the circumstances of the case . . . ." (*People v. Vizcarra*, *supra*, 110 Cal.App.3d at p. 863.) Here, Donald admitted that he approached T. to get a dollar to buy some chips. However, implicitly at least, he claims that there was no intent to take property against T.'s will because students frequently ask each other for money, sometimes even paying it back. Thus, Donald interprets what he did as no more than his making a simple request from T. for a voluntary monetary contribution to satisfy his craving for chips.

However, the circumstances amply support the conclusion that Donald intended to take money involuntarily from T. during their encounter. He twice commanded T. to "[e]mpty your pockets," and also to "[g]ive me all your money," in a tone described by D.N. as "serious." Certainly, under the circumstances T. was justified in feeling that the boys, including Donald, "were trying to steal our stuff." When money was not forthcoming, Donald punched T. in the face. Intent to steal is easily inferred from these facts.

As to the requirement that Donald must have taken a direct, overt act towards the commission of a robbery, once again the record supports the court's finding. Donald confronted T. with the intent to take his money for his own purposes. Not only did Donald and his friends menace T. and D.N. in the manner in which they surrounded the victims and in the "serious" way in which the boys were ordered to give Donald money, but he used force in an effort to obtain the dollar he wanted. A robbery certainly would have been completed except that no property was actually taken from T., as noted by the

trial judge. Therefore, this element of attempted robbery was also supported by the evidence.[5]

IV.

DISPOSITION

The true findings of the trial court are supported by substantial evidence. Therefore, the order adjudging Donald a ward of the juvenile court is affirmed.

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RUVOLO, P. J.

We concur:

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SEPULVEDA, J.

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RIVERA, J.

[5] If an error was made by the juvenile court, it was in deciding that the misdemeanor battery had not been committed because it was "part and parcel" of the robbery. We note that "[i]t is not necessary . . . for [the force or fear] element to be reflected in the overt act of an attempted robbery if the crime has not progressed to that point." (*People v. Vizcarra*, *supra*, 110 Cal.App.3d at p. 862.) An attempt to commit robbery "does not of itself necessarily amount to an assault and does not require assault as an essential element." (*Id.* at p. 863; see also *People v. Medina* (2007) 41 Cal.4th 685, 694 [completed assault is not an element of attempted robbery].)